UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F. Street N.E.
Washington, D.C. 20549

June 3, 2020

Via ECF and Electronic Mail

THE HONORABLE ANALISA TORRES
United States District Judge
U.S. District Court for the
Southern District of New York
500 Pearl Street
New York, NY 10007-1312
Torres_NYSDChambers@nysd.uscourts.gov

Re: *SEC v. Rio Tinto, et al.*, No. 1:17-cv-07994-AT-DCF
Supplemental Authorities

Dear Judge Torres:

Plaintiff Securities and Exchange Commission writes to bring to the Court's attention two recent rulings that directly relate to issues raised by the SEC's pending reconsideration motion. *See* ECF Nos. 182, 186. In particular, these decisions: (1) support the SEC's request that the Court reconsider its ruling that certain violations of the federal securities laws require "conduct beyond misrepresentations or omissions that form the basis of a claim under subsection (b)" of Rule 10b-5, Op. 35 (discussing Rule 10b-5); *see id.* 38 (discussing Section 17(a)); and (2) confirm that a defendant's failure to disclose material information (including when the failure violates a regulation) may be actionable under Rule 10b-5(a) and (c) and Section 17(a)(1) and (3).

In *SEC v. Kameli*, No. 17-4686, 2020 WL 2542154 (N.D. Ill. May 19, 2020) (Gottschall, J.) (Ex. A), the court addressed whether *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), could be interpreted to mean that "asserting claims under Rule 10b-5(a) and (c) based only on misrepresentations generally remains verboten." *Id.* at *14. The court squarely rejected that interpretation, holding that it "is not plausible." *Id.* The court stated that, "[r]ather than positing a fine distinction between 'making' statements and 'disseminating' them, *Lorenzo* effectively abrogated the line of cases on which defendants rely and permits liability under Rule 10b-5(a) and (c) for both making and disseminating misleading statements—despite some resulting redundancy with Rule 10b-5(b)." *Id.* (citing *SEC v. SeeThruEquity, LLC*, No. 18-10374, 2019 WL 1998027 (S.D.N.Y. Apr. 26, 2019)). The court's decision to "reject[ ] defendants' contention that claims under Rule 10b-5(a) and (c) cannot be predicated on the same conduct as that supporting claims under Rule 10b-5(b)," *id.* at *15, mirrors the SEC's arguments in its motion for reconsideration, *see* ECF No. 182, at 8-11; ECF No. 186, at 2-6.

In *Takata v. Riot Blockchain, Inc.*, No. 18-02293, 2020 WL 2079375 (D.N.J. Apr. 30, 2020) (Wolfson, C.J.) (Ex. B), the court ruled that a defendant's alleged violation of "SEC reporting requirements to 'promptly' disclose material changes in his ownership of [a company's] stock" constitutes "a deceptive act that falls within the range of conduct prohibited by Section 10(b) and Rule 10b-5." *Id.* at *15. The court also concluded that the same conduct, even if "not necessarily deceptive by itself, was deceptive when viewed in the wider context of Plaintiff's allegations." *Id.* *Takata* supports the SEC's position that a defendant's failure to disclose material information, including when that failure violates SEC regulations, may constitute a device, scheme, or artifice to defraud, or an act, practice, or course of business which operated as a fraud or deceit. ECF No. 182, at 11-13, 20-22; ECF No. 186, at 9-10. And that is particularly true in the "wider context" of defendants—such as Thomas Albanese and Guy Elliott—who were well positioned to correct statements they knew were misleading.

Respectfully,

/s/ *Martin Totaro*
Martin Totaro
Senior Counsel
Securities & Exchange Commission
(202) 551-7962
totarom@sec.gov
Counsel for Plaintiff

cc: Counsel for Defendants (via ECF)
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